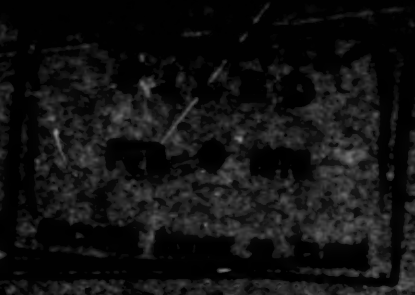

No. 71-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1971

JULIAN M. CARROLL, GOVERNOR OF KENTUCKY, ET AL.,
Petitioners

v.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-722

JULIAN M. CARROLL, GOVERNOR OF KENTUCKY, ET AL.,
PETITIONERS

v.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners, the Governor of Kentucky and the Commonwealth of Kentucky, seek a declaration that three statutes, which explicitly forbid the expenditure of federal aid-to-education funds on home-to-school transportation designed to desegregate public schools, are unconstitutional.

This case involves the school system of Jefferson County, Kentucky, in which racial discrimination took place. That school system has been ordered to reassign students to achieve desegregation; the reassignment cannot be accomplished without additional home-to-school transportation.[1] Because Kentucky must, under

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[1]See *Newburg Area Council, Inc.* v. *Board of Education*, 489 F. 2d 925 (C.A. 6), remanded for reconsideration, 418 U.S. 918, reaffirmed on remand, 510 F. 2d 1358 (C.A. 6), certiorari denied, 421 U.S. 931;

state law, give financial assistance to local school systems, the state must share in the expense of the transportation program.[2] Cf. *Milliken* v. *Bradley*, No. 76-447, decided June 27, 1977.

The Governor of Kentucky, seeking money to purchase and operate the necessary buses, filed suit against the Department of Health, Education, and Welfare. The Governor argued that the three statutes forbidding expenditure of federal funds for home-to-school transportation[3] are unconstitutional, and that the federal government therefore must accept applications for grants to help offset the cost of Jefferson County's busing program. The district court held (Pet. App. 20A-23A) that the three statutes are constitutional but that, even if they were not, no relief would be possible because no federal statute authorizes financial assistance to defray costs of court-ordered transportation. The court of appeals affirmed on the latter ground and did not reach the constitutionality of the statutes (*id.* at 6A-7A).

This decision is correct, and it does not conflict with the decision of any other court. The three statutes to which petitioners object are redundant; they do not "cut off" federal funds for any project, because no other statute authorizes the expenditure of funds for transportation. A central premise of the aid-to-education program is that federal money can be spent only to increase the resources of school systems. Federal money may not be used to replace or supplant funds available from other sources.

Newburg Area Council, Inc. v. *Gordon*, 521 F. 2d 578 (C.A. 6); *Cunningham* v. *Grayson*, 541 F. 2d 538 (C.A. 6), certiorari denied, 429 U.S. 1074.

[2]See Pet. App. 2A-6A. Petitioners do not seek review of this aspect of the court of appeals' decision. Pet. 8.

[3]See 88 Stat. 519, 20 U.S.C. (Supp. V) 1228; 86 Stat. 371, 20 U.S.C. (Supp. V) 1652(a); Pub. L. 94-94, Section 315(b), 89 Stat. 474.

See, *e.g.*, 86 Stat. 363, 20 U.S.C. (Supp. V) 1609(a)(10). Because a federal court has required additional transportation in Jefferson County, the County or the State must provide it. Any federal funds would serve only as a substitute for funds the County or State already must supply, and federal assistance thus would not improve the school program or add any new activities to it. There is therefore no affirmative authorization to pay federal monies for the purposes petitioners have in mind.

Petitioners' argument that the Emergency School Aid Act, 86 Stat. 354, as amended, 20 U.S.C. (Supp. V) 1601-1619, authorizes grants to defray the costs of busing is unconvincing. Petitioners disregard the limitations we discuss above and cite, instead, a portion of that Act's statement of purposes (Pet. 11). The statement of purposes does not authorize federal officials to disregard the limitations of the statute or to provide money for anything other than the 15 school programs set out in Section 1606(a).[4] Transportation simply is not among the programs. Moreover, the Department of Health, Education, and Welfare, which administers that Act, has never interpreted the Act to allow expenditures for transportation, and that view is entitled to great weight. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1, 16.

The three statutes are constitutional at any rate for, as the district court held, Congress has no constitutional obligation to pay for school busing or any other facet of local education (Pet. App. 20A-21A). Petitioners' contention (Pet. 8-9) that the district court's decision adopts a dual standard, forbidding Kentucky to avoid paying for school busing while allowing the federal government to do so, is simplistic. States must obey the Constitution, and

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[4]At the time of the district court's decision, Section 1606(a) included only 12 programs. Since then, Congress has added 3 more. See Pub. L. 94-482, Section 321(c)(2), 90 Stat. 2217.

the federal government is not obliged to pay the expenses of their doing so. Congress may require the states (and their subdivisions) to pay the full cost of correcting conditions that the states (and their subdivisions) have brought about in violation of the Constitution. The United States did not violate the constitutional rights of the children in Jefferson County; the County and the State did. That is ample reason for Congress to require the County and the State, but not the United States, to pay for the remedy. Indeed, states may well be less likely to violate a citizen's rights today if it means paying the costs of making good those rights in the future.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.

DOJ-1978-02